Supreme Court, U.S.
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In The Supreme Court of the United States

FRED BECK, *ET AL.*,

Petitioners,

vs.

KOPPERS INC. F/K/A KOPPERS INDUSTRIES, INC., *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

HUNTER W. LUNDY
Counsel of Record
LUNDY, LUNDY, SOILEAU & SOUTH, LLP
Attorneys at Law
501 Broad Street
P.O. Box 3010
Lake Charles, Louisiana 70602
Telephone: (337) 439-0707
Facsimile: (337) 439-1029

FRANK THACKSTON
Co-Counsel
LAKE TINDALL, LLP
P.O. Box 918
127 South Poplar
Greenville, Mississippi 38702
Telephone: (662) 378-2121

Attorneys for Petitioners, Fred Beck, et al.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is the Court of Appeals for the Fifth Circuit free to issue a writ of mandamus, reversing a decision of the District Court for the Northern District of Mississippi, with no explanation for the basis for the panel's decision – when this Court has expressly ruled, in terms that cannot be misunderstood – that such an explanation *must be* forthcoming?

2. If not, will this Court grant this petition and reverse that ruling by that court of appeals, or, alternatively, will this Court disregard the court of appeals' failure to follow this Court's clear mandate, refuse to grant this petition and thereby sanction that ruling, though it is directly contrary to clear decisions of this Court?

3. Do decisions of this Court permit the Court of Appeals for the Fifth Circuit to issue a writ of mandamus, to reverse a district court's discretionary decision, which involved *no* "extraordinary" ruling, no "exceptional" decision and no "drastic" action by the district court when this Court has consistently ruled that writs of mandamus must only be issued to address limited circumstances not involved in this case?

4. If not, will this Court permit this writ of mandamus to remain in full force and effect, thereby compelling the district court to conduct jury trials at the location preferred by one party and, apparently, one panel of the court of appeals?

QUESTIONS PRESENTED – Continued

5. Do decisions of this Court authorize the court of appeals to issue a writ of mandamus, to reverse a district court's decision, that involves no inappropriate exercise of jurisdiction by the district court – when this Court, in case after case, had admonished lower courts that writs of mandamus are only to be issued, under limited and extraordinary circumstances, usually to address clear abuses of a lower court's jurisdiction?

6. If not, will this Court grant this petition and vacate this writ or will this Court allow this writ to be enforced as against the district court?

7. Will this Court refuse to grant this petition and thereby sanction the issuance of this writ by the Court of Appeals for the Fifth Circuit to substitute for an appeal of the district court's venue decision – despite rulings by this Court that mandamus is no substitute for appeal?

LIST OF PARTIES

Additional parties are:

Kay Hobbs
Walter Hobbs
David Hill
Alice Hill
Carlus Loggins
Debbie Loggins
Makia Carver
Michael Topps
Glenda Faye Mitchell
Derion Griffin
Jennifer Griffin
Nykiya George
Nicholas Hill
Jarvis McNeal
Talicia McNeal
Leroy McNeal
Willie McNeal
Patricia McNeal
Loretta McNeal
L.C. McNeal

Petitioners,

Koppers Inc. f/k/a Koppers Industries, Inc.
Beazer East, Inc.
Illinois Central Railroad Company, Inc.

Respondents.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit, dated April 3, 2009 is unreported and reprinted at Appendix ("App.") A. (A written decision was not submitted/rendered with the court's April 3, 2009 order.) The order denying Koppers' first petition for writ of mandamus of the first panel of the court of appeals to hear the petition, dated March 16, 2007, is unreported and reprinted at App. B. The decisions of the district court granting Petitioners' *ore tenus* motion, and denying Koppers' motion for reconsideration is reprinted at App. C-E.

JURISDICTION

The court of appeals granted the petition for writ of mandamus on April 3, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1404(a) provides:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 104 provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Mississippi is divided into two judicial districts to be known as the northern and southern districts of Mississippi.

NORTHERN DISTRICT (a) The northern district comprises four divisions. (1) Eastern division comprises the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Prentiss, Tishomingo, and Winston.

Court for the eastern division shall be held at Aberdeen, Ackerman, and Corinth. (2) The western division comprises the counties of Benton, Calhoun, Grenada, Lafayette, Marshall, Montgomery, Pontotoc, Tippah, Union, Webster, and Yalobusha.

Court for the western division shall be held at Oxford. (3) The Delta division comprises the counties of Bolivar, Coahoma, De Soto,

Panola, Quitman, Tallahatchie, Tate, and Tunica.

Court for the Delta division shall be held at Clarksdale. (4) The Greenville division comprises the counties of Carroll, Humphreys, Leflore, Sunflower, and Washington.

Court for the Greenville division shall be held at Greenville.

SOUTHERN DISTRICT (b) The southern district comprises five divisions. (1) The Jackson division comprises the counties of Amite, Copiah, Franklin, Hinds, Holmes, Leake, Lincoln, Madison, Pike, Rankin, Scott, Simpson, and Smith. Court for the Jackson division shall be held at Jackson. (2) The eastern division comprises the counties of Clarke, Jasper, Kemper, Lauderdale, Neshoba, Newton, Noxubee, and Wayne.

Court for the eastern division shall be held at Meridian. (3) The western division comprises the counties of Adams, Claiborne, Issaquena, Jefferson, Sharkey, Warren, Wilkinson, and Yazoo.

Court for the western division shall be held at Natchez and Vicksburg. (4) The southern division comprises the counties of George, Hancock, Harrison, Jackson, Pearl River, and Stone.

Court for the southern division shall be held at Biloxi and Gulfport. (5) The Hattiesburg division comprises the counties of Covington, Forrest, Greene, Jefferson Davis, Jones,

Lamar, Lawrence, Marion, Perry, and Walthall.

Court for the Hattiesburg division shall be held at Hattiesburg.

STATEMENT OF THE CASE

Petitioners allege personal injury and property damages from various exposures to chemicals associated with Koppers' operation of the Grenada County wood treating facility.

In March, 2003, 110 residents of Grenada, Mississippi, sued Koppers, Inc., *et al.,* in the Western Division (at Oxford, Mississippi) of the Northern District of Mississippi. The case was later severed into individual actions. On March 15, 2005, the district court assigned to these cases (Judge Allen Pepper) entered an Order sustaining Koppers, *et al.*'s Motion to conduct trials of these lawsuits in Oxford, Mississippi. Thereafter, separate trials, on twelve of the 110 Petitioners' lawsuits, were scheduled to occur in Oxford, Mississippi on alternative months. On April 17, 2006, the first of these twelve cases, *Sherri Barnes v. Koppers, Inc., et al.,* was tried at Oxford, Mississippi for three weeks. On May 5, 2006, the jury returned a verdict in favor of Sherri Barnes. On May 17, 2006, District Judge Pepper entered an order granting Petitioners' *ore tenus* motion seeking the scheduling of the remaining trials against Koppers at

Judge Pepper's duty station in Greenville, Mississippi.

Koppers promptly filed a motion asking the district court to reconsider the court's May 17, 2006, Order. On July 25, 2006, the district court denied Koppers' Motion for Reconsideration. On July 26, 2006, Koppers filed its Notice of Appeal of the jury verdict entered in favor of Sherri Barnes.

On February 13, 2007, Koppers filed an Application for writ of mandamus to the Fifth Circuit Court of Appeals seeking the following relief:

> "Petitioners Koppers, Inc., and Beazer East, Inc., respectfully request that the court issue a writ of mandamus directing the district court to vacate its May 17, 2006, and July 25, 2006, Orders transferring all future trials in this litigation from the Western Division to the Greenville Division and reset all future trials in this litigation in the Western Division."[1]

In its first writ of mandamus, Koppers asserts that its writ is "clearly justified" because:

> 1. "The transfer of all future trials and the application of the informal local practice articulated and relied on by the district court

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[1] Koppers' writ of mandamus, page 15.

> is inconsistent with the plain and unambiguous test of 28 U.S.C. § 1014 and 1404."[2]
>
> 2. "The district court erred in its interpretation and application of the 'interest of justice' language of 28 U.S.C. § 1404."[3]
>
> 3. "Respondents lack standing to seek transfer pursuant to 28 U.S.C. § 1404."[4]

On February 14, 2007, Koppers filed its appellate brief in *Barnes*. One multi-page section in Koppers' Brief is introduced with the following caption:

> "To the extent this case is remanded for a new trial, the district court *does not* have authority to transfer this action from the Western Division to the Greenville Division pursuant to an unwritten and unpublished practice of the Northern District of Mississippi."[5]

The relief sought and the arguments made regarding the location of future trials by Koppers via its Application for writ of mandamus as well as Koppers' Brief in *Barnes* was identical.

On March 16, 2007, a panel of the Fifth Circuit Court of Appeals (Judges King, Higginbotham and

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[2] Koppers' writ of mandamus, page 21.

[3] Koppers' writ of mandamus, page 21.

[4] Koppers' writ of mandamus, page 26.

[5] *Barnes v. Koppers Inc.*, 534 F.3d 357 (2008).

Garza), denied Koppers' application for writ of mandamus (and by such denial, such panel refused to direct Judge Pepper to conduct future trials against Koppers in Oxford, Mississippi).[6]

On November 6, 2008, a separate/different panel of the Fifth Circuit Court (Judges Jones, Garwood and Jolly), ruled that Sherri Barnes' claim was barred by a Mississippi Statute of Limitation. *Barnes v. Koppers Inc.*, 534 F.3d 357 (5th Cir. 2008). But that panel did not order Judge Pepper to try subsequent cases against Koppers in Greenville, nor did it determine that Judge Pepper's May 17, 2006, and July 25, 2006, Orders were contrary to law or constituted any abuse of discretion.

Following this Court's reversal of the *Barnes* jury verdict, Judge Pepper conducted a November 25, 2008, Status Conference at which the further handling of the eleven lawsuits that remained to be tried against Koppers was discussed. Despite the fact that the Fifth Circuit Court of Appeals had not granted Koppers' prior requests to order Judge Pepper to conduct future trials in this action in Oxford, Koppers continued to complain about Judge Peppers' decision. Perhaps weary of Koppers' unrelenting efforts to secure trials at a location where Koppers *believed it had a tactical advantage*, the district judge invited Koppers to file *yet another* motion asking him

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[6] See Appendix B.

to order that trials of the upcoming eleven lawsuits against Koppers take place in Oxford, Mississippi.

Following this November 25, 2008, Status Conference, Koppers filed a *third Motion* seeking such a ruling from Judge Pepper. On January 29, 2009, Judge Pepper once again denied Koppers' Motion, but he granted Koppers' request for interlocutory certification. In doing so Koppers was allowed to once again ask the Fifth Circuit Court of Appeals to decide whether, *as a matter of law*, it was mandatory that cases filed in Oxford be tried in Oxford – or whether Judge Pepper had the *discretion* to conduct trials of cases filed in Oxford in Greenville, and if so, whether Judge Pepper "abused" that discretion in deciding to try these cases in Greenville.

On February 20, 2009, Koppers filed a *second* and nearly identical application to the Fifth Circuit Court of Appeals asking it to issue a writ of mandamus, despite the fact that another panel of the court had previously refused to issue such an extraordinary writ.

In its Second Petition for writ of mandamus, Koppers asserts the issuance of its writ is "clear and undisputable,"[7] because:

> 1. "The district court lacks the authority to transfer the location of all future trials to another division, over the objection of

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[7] Koppers' second writ of mandamus, page 9.

Petitioners, without transferring the venue of the entire action."[8]

2. "The district court clearly abused its discretion by misapplying the law to the facts under *Volkswagen* and reached a patently erroneous legal conclusion under 1404(a)."[9]

3. "Convenience of parties and interest of justice weigh heavily in favor of trial in the Western Division."[10]

4. "The district court ignored the significant local interest of trying these cases in the Western Division."[11]

5. "The district court clearly abused its discretion."[12]

The second panel of that court – unlike the first panel of the court – granted Koppers' second redundant, Application for writ of mandamus thereby compelling Judge Pepper to conduct the next trial of the second plaintiff in this case at the Division location of Koppers' choice, Oxford, Mississippi.

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[8] Koppers' second writ of mandamus, page 9.

[9] Koppers' second writ of mandamus, page 11.

[10] Koppers' second writ of mandamus, page 14.

[11] Koppers' second writ of mandamus, page 15.

[12] Koppers' second writ of mandamus, page 15.

REASONS FOR GRANTING THE PETITION

Petitioners are keenly aware of the realities that face them, as this Court considers whether the issues presented by this petition are of sufficient *importance* to warrant this Court's consideration.

Petitions for Writs of Certiorari – Petitioners acknowledge – are rarely granted. Perhaps that fact explains why a Court of Appeals for the Fifth Circuit panel saw fit to grant the writ of mandamus to be hereafter discussed. Such panel apparently believed that it was free to disregard rulings of this Court, because if such a decision was challenged, this Court would likely not address such a ruling – because, as stated, petitions seeking writs of certiorari to this Court are rarely granted.

That ruling, that panel's grant of this writ of mandamus in this case presents this Court with this issue, via this petition: Is any three judge panel, of any court of appeals in America, free to grant a writ of mandamus – *with no explanation*, and thereby overrule a purely discretionary decision by a district judge, in a case involving no "extraordinary" or "exceptional" or "drastic" circumstance?

If courts of appeals in America are free to issue writs of mandamus, to reverse district court decisions that are neither "extraordinary"[13] nor

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[13] " . . . the writ [of mandamus] will issue only in *extraordinary circumstances*. . . ." *Kerr v. United States*, 426 U.S. 394, 96 S.Ct. 2119, 48 L. Ed. 2d 725 (1976).

"exceptional"[14] or "drastic"[15] – *with no explanation,* then this Court should deny this petition.

This Court has directed lower courts, in terms that simply cannot be misunderstood, that before a writ of mandamus can issue such courts *must* "give a reasoned explanation for the basis for its action" because of the "extremely awkward positions" that grants of writs of mandamus impose upon district judges. *Will v. United States*, 389 U.S. 90 (1967). No explanation accompanied this panel's grant of this writ – the "awkward position" that this ruling conferred upon District Judge Pepper was of no concern to this panel.

Are courts of appeals free to disregard that clear directive? If courts of appeals are free to issue writs of mandamus, with no explanation, then the directive of this Court becomes mere "lip service." Can it be that this Court's express directive, to lower courts, which this panel saw fit to disregard, means nothing? If so, this Court should deny this petition.

This Court has also directed lower courts to *only* issue writs of mandamus "where appeal is a *clearly*

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[14] " . . . only *exceptional* circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90 (1967).

[15] "Mandamus, prohibition and injunction against judges are *drastic* and extraordinary remedies." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953).

inadequate remedy,"[16] further observing that "the extraordinary writs cannot be used as substitutes for appeals."[17] There is no reason to suspect that, since Respondent disagrees with Judge Pepper's decision, Respondent would experience *any difficulty* whatsoever in seeking appellant review to address Respondent's disagreement. Indeed, Respondent has fared quite well in the court of appeals, in addition to securing this favorable venue decision from that court,[18] this panel granted mandamus thereby eliminating any need for Respondent to appeal. If lower courts are free to substitute writs of mandamus for appeals – as here occurred – and this Court sees no reason to address such a practice – then this petition should be denied.

As mandated by statute,[19] jury trials in the Northern District of Mississippi are conducted at three locations: at Oxford, Mississippi, at Aberdeen, Mississippi, and at Greenville, Mississippi.

District Judge Allen Pepper sustained Respondents' (Koppers) motion and severed, for trial purposes, the separate claims of twelve separate Petitioners, each of whom claimed that deliberate,

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[16] *Id.* at 112.

[17] *Id.* at 113.

[18] In the first of twelve trials between these parties, the court of appeals vacated a jury verdict in plaintiff's favor and rendered judgment in Koppers' favor.

[19] See 28 U.S.C. § 104. Trials no longer take place at the Clarksdale Division.

reoccurring, emissions of carcinogenic chemicals from Respondent's wood treatment plant, was negligent, constituted trespass, were a nuisance and caused injury. After conducting the first of such twelve trials in Oxford, Mississippi,[20] Judge Pepper, over Respondent's objection, sustained a motion by Petitioners to conduct the remaining eleven trials in Greenville, Mississippi.

The basis for Judge Pepper's decision is stated in a detailed, well reasoned, written opinion which hopefully this Court will see fit to review.

No reading of Judge Pepper's opinion, fair or unfair, biased or unbiased, agenda driven or objective, would support a finding that Judge Pepper's decision, to try these remaining cases in Greenville and not Oxford, involved anything more than a perfectly permissible exercise of judicial discretion on the part of this district judge.

This Court has ruled that writs of mandamus are to be issued " . . . only in the *exceptional case* where

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[20] An all white jury impaneled to hear/decide the trial of this case in Oxford, Mississippi, returned a verdict in Plaintiff's favor. But as stated, a panel of the court of appeals vacated this judgment, ruling that Mississippi's three-year Statute of Limitations which begins to run on the date a tort victim sustained "injury," began to run when Sherrie Barnes first learned she had an "illness," i.e., breast cancer, which Koppers claimed was not caused by its chemicals.

there is *clear* abuse of discretion or 'usurpation of judicial power.'"[21]

Judge Pepper obviously possesses "jurisdiction" to decide the venue issue submitted to him. Judge Pepper's decision as to the locations where these trials would occur was clearly within Judge Pepper's "prescribed jurisdiction" – and Respondents do not dispute that assertion.

If courts of appeals panels are free to issue writs of mandamus, with *no finding* that a discretionary venue decision by district judges is in any way "exceptional" or with no finding that a district court's discretion as to venue involves an "usurpation of judicial power," whatsoever, or with *no finding* of any failure to act, when there exists a duty to act, then clear decisions of this Court prescribing the *limited* circumstances under which such writs can issue also mean nothing. If that be this Court's ruling on this petition then this petition should be denied.

Petitioners appreciate the fact that, whether their upcoming trials are tried in Oxford or Greenville – while important to Petitioners and Respondents Koppers[22] to be sure – perhaps will be viewed by this

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[21] Writs of mandamus, traditionally, are employed " . . . to confine an interior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

[22] Respondent's true purpose for seeking issuance of a writ of mandamus from the court of appeals – to compel the district

(Continued on following page)

Court to be of little importance – when compared to other issues which this Court is asked to decide.

But what about a court of appeals which – for whatever reason – grants a writ of mandamus in flagrant disregard of multiple, crystal clear, decisions of this Court?

Would that not be conduct which is of concern to this Court? For after all, this petition does not ask this Court to *construe* or *interpret* any aspect of any decision of this Court – this Court's opinions relating to writs of mandamus simply are not susceptible to misunderstanding. Instead, Petitioners ask this Court to *enforce* the rules of law that its prior decisions clearly express.

But if this Court sees no reason to compel lower courts to follow – not disregard – its prior ruling – then would not courts generally, and the Court of Appeals for the Fifth Circuit specifically, then be free to decide: *When* does this Court mean what its decisions state versus *when* are lower courts free to disregard this Court's rulings, with no consequence?

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court to schedule trials in Oxford, not Greenville – is not stated in Respondent's petition. Though one must wonder whether the prospect of again securing an all White jury versus racially diverse jury that would result from a Greenville trial, constitutes Respondent's purpose.

ARGUMENT

Though the granting of Koppers' second application for writ of mandamus directly contradicted that court's first denial of Koppers' first Application for writ of mandamus – both Applications asking the court of appeals to substitute that court's *discretion* as to where the trials of these eleven remaining cases would be conducted for Judge Pepper's discretion on that issue – the court of appeals refused to resolve these diametrically opposite rulings by these two panels via a request for *en banc* consideration filed by/on behalf of these Petitioners.

But even more startling, the fact that both rulings by the court of appeals: granting Koppers' motion for writ of mandamus in the first place – with no explanation for the basis of that decision – and then refusing to resolve conflicting rulings by two panels of that court *en banc* – again with no explanation – were forthcoming with no regard for multiple decisions of this Court as well as from other panels of the court of appeals.

By granting Koppers second application for writ of mandamus, the court of appeals ignored clear mandates in multiple decisions of this Court. By granting Koppers its venue choice, in disregarding/ignoring/substituting its venue judgment for that of Judge Pepper – with no explanation for its decision and no explanation for its refusal to resolve two conflicting panel decisions.

Since enactment of § 1404(a) in 1948 and the earliest subsequent attempts to obtain interlocutory review of transfer rulings, there have been strenuous critics of using mandamus in this setting. Wright and Miller comment that mandamus is not controversial "if the issue goes to the power of the district court to make the order it did and only a question of law is presented." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3855 at 325 (3d ed. 2007). By contrast:

> "But a very compelling argument can be made that if there is no question of power, and the only issue is whether the district judge exercised his or her discretion properly in considering the factors mentioned in the statute in granting or refusing the transfer, interlocutory review ought not be available. This is the view of the commentators, it is the view of the American Law Institute, and it has been the view of many distinguished appellate judges."

Id.

The granting of a writ of mandamus by a court of appeals – to compel a district judge to vacate a discretionary decision by such judge – with no explanation for the basis of such a ruling was before this Court in *Will v. United States,* 19 L. Ed. 2d 305 (1967), in language that could not be misunderstood by the court of appeals this Court stated:

> "Due regard, not merely for the reviewing functions of this Court, but for the 'drastic

> and extraordinary' nature of the mandamus remedy, . . . and for the extremely awkward position in which it places the district judge, . . . demands that a court issuing the writ give a reasoned exposition of the basis of the action."

Id.

This Court has held:

> "Because the supervisory writ of mandamus is an extraordinary remedy, we issue one only in extraordinary or compelling situations. *Kerr v. United States,* 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976); *Will v. United States,* 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L. Ed. 2d 305 (1967); *In re Fibreboard Corp.,* 893 F.2d 706, 707 (5th Cir. 1990). '[O]nly exceptional circumstances amounting to a judicial "usurpation of power,'" *Will,* 389 U.S. at 95, 88 S.Ct. at 273, or 'clear . . . abuse of discretion' when 'no other adequate means of obtaining relief is available,' *Fibreboard*, 893 F.2d at 707 (5th Cir. 1990) *(citations omitted in original),* justifies invoking this extraordinary remedy. The petitioner has the burden of establishing by a 'clear and undisputable' showing that he is entitled to the writ."

Mandamus pertaining to the denial or granting of a transfer of venue under section 1404(a) will be issued only if the movant proves that the district court neglected to correctly construe or apply a relevant statute, or to consider the factors relevant to

ruling upon the motion, or abused its discretion in deciding the motion. *In re Volkswagen AG,* 371 F.3d 201, 204 (5th Cir. 2004) *citing Castanho v. Jackson Marine, Inc.,* 650 F.2d 546, 550 (5th Cir. 1981). The factors which the court considers when presented with such a petition are:

a.) Did the district court correctly construe and apply the relevant statues;

b.) Did the district court consider the relevant factors incident to ruling upon a motion to transfer; and

c.) Did the district court abuse its discretion in deciding the motion to transfer.

Volkswagen, 371 F.3d at 202-03; *citing Ex Parte Chas. Pfizer & Co.,* 225 F.2d 720 (5th Cir. 1955); *In re Horseshoe Entm't,* 540 U.S. 1049, 124 S.Ct. 826, 157 L. Ed. 2d 698 (2003).

Decisions from this Court characterize mandamus as a "drastic" and "extraordinary" remedy. This Court in *Bankers Life & Cas. Co. v. Holland,* 98 L. Ed. 2d 111 (1953), stated:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should

> be resorted to only where appeal is clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes."

Id. at 112, 113.

No reading of Judge Pepper's opinion, fair or unfair, biased or unbiased, would support a finding that Judge Pepper's decision to try these remaining cases against Koppers in Greenville or Oxford involved anything more than a perfectly permissible exercise of discretion by that Judge.

Mandamus has traditionally been employed "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Bankers Life & Cas. Co. v. Holland,* supra. In *Kerr v. United States,* 426 U.S. 394, 96 S.Ct. 2119, 48 L. Ed. 2d 725 (1976), this Court, after first acknowledging that a court of appeals' use of mandamus was not limited to "an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction'," nonetheless stated:

> " . . . the fact still remains that 'only exceptional circumstances' amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."

A purely discretionary decision, by a district judge on an issue of "venue" that involves no issue of "jurisdiction," is simply not a judicial act which a writ of mandamus is designed to address – even if

such discretionary decision would be deemed to be erroneous.

Speaking of a district court's discretion as to venue, *Bankers Life* involved a suit filed in Florida by an Illinois insurance corporation, who sued multiple parties, including the Insurance Commissioner for the State of Georgia. The Georgia Insurance Commissioner complained that venue as to him was improper. The district court agreed and transferred the action, as to the Georgia Insurance Commissioner from Florida to Georgia, where the Commissioner resided. A writ of mandamus was sought by Petitioners to compel the district court to vacate and set aside the court's order of severance and transfer. The court of appeals dismissed the petition on the grounds that it was not an appropriate remedy under the circumstances of that case.

Since the Florida District Court, which transferred the case to Georgia, had "jurisdiction" with respect to the suit filed by Petitioners as well as jurisdiction as to the Georgia Insurance Commissioner, the district court's decision, to transfer the cause of action, "was made in the course of the exercise of the court's jurisdiction to decide issues properly before it." Even if that *venue decision* was erroneous, this Court ruled, *Mandamus was not proper remedy to address that error.* This Court observed:

> "Its decision against petitioner, even if erroneous – which we do not pass upon – involved

> no abuse of judicial power . . . and is reviewable upon appeal after final judgment."

Bankers Life & Cas. Co. v. Holland, supra.

Mandamus is available, the court in *Bankers Life* ruled, "Only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies they [Writs of Mandamus] are reserved for really extraordinary cases." *Bankers,* 98 L. Ed. 113 (1953).

Judge Pepper's decision involves *no abuse* of discretion, much less a "clear" abuse of discretion. Judge Pepper's decision involves no usurpation of judicial power. To again quote from *Bankers Life:*

> " . . . the All Writs Act is meant to be used only in the exceptional case where there is *clear abuse* of discretion or 'usurpation' of judicial power. . . ."

Bankers, 98 L. Ed. 112 (1953).

There can be no legitimate claim that Judge Pepper exceeded his "lawful exercise" of "prescribed jurisdiction." Yet the court of appeals granted Koppers' petition anyway – and refused to explain its reasons for that ruling, although Judge Pepper provided the court of appeals with a detailed explanation as to the basis for Judge Pepper's discretionary venue judgment. In response, the court of appeals substituted its judgment for that of Judge Pepper with no explanation for the basis of the court of appeals' grant of the writ.

Mandamus, it must be remembered, does not "run the gauntlet of reversible errors." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953). Its office is not to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power. *Id.*, at 383.

Disputing the court of appeals' refusal to explain its grant of Koppers' writ of mandamus, Petitioners point to *Will v. United States,* 19 L. Ed. 2d 305 (1967). In *Will,* Petitioner, a federal district judge, ordered the Government to supply certain information requested by the defendant in a bill of particulars in a criminal case. The prosecutor refused to comply on the ground that the request constituted a demand for a list of prosecution witnesses, the production of which Petitioner lacked power to compel under Fed. Rule Crim. Proc. 7(f). Petitioner thereupon indicated his intention to dismiss the indictments against the defendant. The Government petitioned the court of appeals for a writ of mandamus to compel Petitioner to strike the request for information from his bill of particulars order. On the basis of briefs filed, that court initially denied the Government's petition but, without new briefs or oral argument, and without opinion, reversed itself and issued a writ of mandamus directing Petitioner to vacate his order. Petitioner filed for Writ of Certiorari to the United States Supreme Court, in which this Court held "the record in this case discloses no proper justification for the court of appeals to have invoked the extraordinary writ of mandamus to review the

trial court's interlocutory order." *Will*, 389 U.S. 95-107. Further, this Court in *Will* proclaims:

> "without an opinion from the court of appeals we do not know what role, if any, this factor played in the decision below. In fact, we are in the dark with respect to the position of the court of appeals on all issues crucial to an informed exercise of our power of review. . . . We cannot properly identify the questions for decision in the case before us without illumination of this unclear record by the measured and exposed reflection of the court of appeals."

Id. at 107.

The court of appeals rendered a mirror image decision in this present case as in *Will*, by refusing to render an informed, written justification to accompany and support its grant of a writ of mandamus.

In this present case, the deficiency in the record is the failure of the court of appeals to attempt to supply any reasoned justification for its action. This Court in *Will* concluded, "what might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the court of appeals, we cannot and do not say. Hence the writ is vacated. . . ." *Id.* at 107.

Petitioners on this petition are aware of the realities that face them in this Court, as this Court undertakes to decide whether the issues presented by

this petition are of sufficient national importance to warrant this Court's consideration.

Petitioners appreciate the fact that whether they are permitted to try their cases in Oxford or Greenville – while important to Petitioners and Koppers to be sure – in terms of the types of questions this Court is called upon to address is of little importance.

Mandamus is not a punitive remedy. The entire thrust of the Koppers' justification for mandamus in this case, moreover, is that the writ serves a vital corrective and didactic function. Petitioners fail to see how they can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which Koppers' attempts to justify its writ of mandamus.

Petitioners believe and thus assert that the granting of this writ of mandamus – and the refusal to address the propriety of that ruling *en banc* – constitutes a flagrant disregard by the court of appeals, of multiple, crystal clear, decisions of this Court.

Lack of opinion by the court of appeals precludes any proper appraisal of the basis for its invocation of the extraordinary writ of mandamus.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: January 5, 2010

Respectfully submitted,

HUNTER W. LUNDY
Counsel of Record
LUNDY, LUNDY, SOILEAU & SOUTH, LLP
Attorneys at Law
501 Broad Street
P.O. Box 3010
Lake Charles, Louisiana 70602

FRANK THACKSTON
LAKE TINDALL, LLP
P.O. Box 918
127 South Poplar
Greenville, Mississippi 38702

Attorneys for Petitioners,
Fred Beck, et al.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-60127

IN RE: KOPPERS INC., formerly known as Koppers Industries Inc.; BEAZER EAST INC.; ILLINOIS CENTRAL RAILROAD CO.

Petitioners

Petition for a Writ of Mandamus to the United States District Court for the Northern District of Mississippi at Oxford

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(Filed Apr. 3, 2009)

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is GRANTED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60129

In Re: KOPPERS INC, formerly known as Koppers Industries Inc; BEAZER EAST INC, formerly known as Beazers Materials and Services Inc

Petitioners

- -

Petition for Writ of Mandamus to the United States District Court for the Northern District of Mississippi, Oxford

(Filed Mar. 16, 2007)

- -

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is denied.

/s/ SMG CDK PCK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
WESTERN DIVISION

FRED BECK; ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:03CV60-P-D

KOPPERS, INC., f/k/a KOPPERS INDUSTRIES, INC.; ET AL., DEFENDANTS.

CONSOLIDATED WITH

HOPE ELLIS, ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:04CV160-P-D

KOPPERS, INC., f/k/a KOPPERS INDUSTRIES, INC.; ET AL., DEFENDANTS.

ORDER

(Filed May 17, 2006)

This matter comes before the court upon the plaintiffs' *ore tenus* motion to transfer venue from the Western Division to the Greenville Division made on or about May 1, 2006 during the trial of Plaintiff Kenesha Barnes's claims. Upon due consideration of the motion and the defendants' objections thereto made previously in their December 2, 2004 Motion to Return this Matter for Trial in the Western Division, the court finds as follows, to-wit:

Beck, et al. v. Koppers, Inc., et al., Cause Number 3:03cv60, originally involved 110 plaintiffs and was

filed on March 20, 2003 in the Western Division of the Northern District of Mississippi. As is customary, the court initially set the trial to occur at the undersigned's duty station, Greenville, Mississippi, which resides in the Greenville Division of the Northern District of Mississippi. On March 16, 2005, the court granted the defendants' Motion to Return this Matter for Trial in Western Division, thereby resetting the trial to occur in the U.S. Courthouse in Oxford, Mississippi.

On April 18, 2005, the court severed the claims of 98 of the 110 plaintiffs and ordered that the claims of the remaining 12 would be tried separately. Since the court was faced with one trial when it granted the defendants' Motion to Return this Matter for Trial in Western Division, the court made it known to the parties after the order setting 12 separate trials that the last 10 trials would occur in Greenville, Mississippi.

Though the parties had requested five to six weeks for trial, the court tried the first trial involving the claims of Plaintiff Kenesha Barnes on behalf of the Estate of Sherrie Barnes in Oxford for just over three weeks – i.e., from April 17, 2006 to May 5, 2006 for the compensatory damages phase and from May 11-12, 2006 for the punitive damages phase. At or near the end of the compensatory damages phase, the plaintiff's made an *ore tenus* motion to transfer the venue of the second trial to Greenville as the court had already done with the last 10 trials. The defendants relied on their arguments in their original

Motion to Return this Matter for Trial in Western Division in opposition to the request.

Having experienced the first three-week trial, the court concludes that the motion to transfer all of the remaining 11 cases back to Greenville should be granted. Title 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. Though the language "the convenience of parties and witnesses, in the interest of justice" might suggest otherwise, "it is well established that the interest of justice is a factor to be considered on its own and an important one and that the interest of justice may be decisive in ruling on a transfer motion. . . ." 15 Fed. Prac. & Proc.2d § 3854 (citing *e.g., Coffey v. Van Dorn Iron Works,* 796 F.2d 217, 222 (7th Cir. 1986) ("The 'interest of justice' analysis relates, then, to the efficient functioning of the courts, not to the underlying dispute.").

The reasons weighing in favor of transfer follow. With regard to the convenience of the parties and witnesses, it is only 25 miles farther to Greenville from Grenada (home of the subject wood-treatment plant and the plaintiffs) than from Grenada to Oxford. Unlike Oxford, there is an airport in Greenville for the parties' experts and accommodations are more readily available in addition to costing less than those in the busy college-town of Oxford. Furthermore, it is just as easy to reach Greenville by car as it is to reach Oxford.

There are five factors weighing in favor of transfer with regard to § 1404(a)'s interest of justice factor. First, 28 U.S.C. § 1393, the divisional venue statute, was repealed in 1988 as part of the Judicial Improvements and Access to Justice Act. Second, as mentioned above, the court would have been far more reluctant to grant the defendants' Motion to Return this Matter for Trial in Western Division had it known the case would be separated into twelve separate trials. Furthermore, since the court's original transfer order, the court consolidated the case of *Ellis, et al. vs. Koppers, Inc. et al.*, Cause Number 3:04cv160 with the instant case, thereby adding 948 additional plaintiffs. It is highly burdensome and inefficient for the court to try twelve (possibly more) 3-to-6-week trials 145 miles away from its duty station. Fourth, given there is only a 25 mile difference between holding a trial in Greenville versus Oxford, trying twelve 3-to-6-week trials in Oxford poses an unreasonable burden on the tax-payers who have to pay the undersigned and his law clerks, secretary, courtroom deputy, and court reporter thousands of dollars for mileage, meals, and hotel accommodations. Fifth, since the instant motion does not involve transfer of venue from one district to another but rather from one division to another, the only practical difference between trying the case in Greenville or Oxford is the jury pool given that in either event the parties will retain the same judge. The defendants have proffered no clear and convincing evidence that there is any difference between the quality of a jury in Greenville as opposed to one in Oxford. *See In re Horseshoe*

Entertainment, 305 F.3d 354, 358 (5th Cir. 2002) (possibility of prejudice, such as larger verdicts, in one district or another must be established by clear and convincing evidence; vague and indefinite circumstances will not suffice). Finally, it is also unduly burdensome on the Greenville courthouse to be without a district judge for twelve 3-to-6-week periods 145 miles away since there would be no district judge to attend to emergency or criminal matters that inevitably arise in the course of the court's business.

IT IS THEREFORE ORDERED AND ADJUDGED that:

(1) The plaintiffs' *ore tenus* motion to transfer the remaining 11 separate trials in this matter is hereby **GRANTED**; therefore,

(2) All remaining trials in this matter will be held at the U.S. Courthouse in Greenville, Mississippi.

SO ORDERED this the 17th day of May, A.D., 2006.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
WESTERN DIVISION

FRED BECK; ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:03CV60-P-D

KOPPERS, INC., f/k/a KOPPERS INDUSTRIES, INC.; ET AL., DEFENDANTS.

CONSOLIDATED WITH

HOPE ELLIS, ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:04CV160-P-D

KOPPERS, INC., f/k/a KOPPERS INDUSTRIES, INC.; ET AL., DEFENDANTS.

ORDER

(Filed Jul. 25, 2006)

This matter comes before the court upon Defendant Koppers, Inc. and Beazer East, Inc.'s Motion for Reconsideration of May 17, 2006 Order Transferring This Matter for Trial to the Greenville Division, or, in the Alternative, Motion for Certification of Issue for Interlocutory Appeal [1065-1]. After due consideration of the motion and the responses filed thereto, the court finds as follows, to-wit:

For the reasons discussed in its May 17, 2006 Order, in which the court transferred the location of trial from Oxford to Greenville, the instant motion

should be denied. The court notes that in the subject Order, the court did not transfer venue in this case from the Western Division to the Greenville Division; rather, it simply changed the location of trial. It is within the practice of the Northern District of Mississippi to allow a court the discretion to try any case assigned to a given judge at his duty station. In the Northern District, when one files in a given division, the judge is assigned randomly. This is opposed to the Southern District of Mississippi wherein a given division is assigned to a certain judge.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant Koppers, Inc. and Beazer East, Inc.'s Motion for Reconsideration of May 17, 2006 Order Transferring This Matter for Trial to the Greenville Division, or, in the Alternative, Motion for Certification of Issue for Interlocutory Appeal [1065-1] is **DENIED** in both respects.

SO ORDERED this the 25th day of July, A.D., 2006.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 09-60127

IN RE: KOPPERS INC., formerly known as Koppers Industries Inc.; BEAZER EAST INC.; ILLINOIS CENTRAL RAILROAD CO.

Petitioners

Appeal from the United States District Court for the Northern District of Mississippi, Oxford

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ON PETITION FOR REHEARING EN BANC

(Filed Oct. 7, 2009)

(Opinion ___, 5 Cir., ___, ___, F.3d ___)

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

Judge Smith and Judge Barksdale did not participate in the consideration of the petition for rehearing en banc.